SUPREME COURT, U. S.

APPENDIX

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In the Supreme Court of the United States

No. 70-5276

ALBERT DELANOR MURREL ET AL., PETITIONERS,

v.

BALTIMORE CITY CRIMINAL COURT ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 28, 1971
CERTIORARI GRANTED DECEMBER 20, 1971

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ALBERT DELANOR MUREL ET AL., PETITIONERS,

v.

BALTIMORE CITY CRIMINAL COURT ET AL.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOHN SAS, *Appellant*,

v.

STATE OF MARYLAND, Director of Patuxent Institution, *Appellees*.

ALBERT DELANOR, MUREL, *Appellant*,

v.

STATE OF MARYLAND and Director of Patuxent Institution, *Appellees*.

JAMES C. SHINE, *Appellant*,

v.

STATE OF MARYLAND, Director of Patuxent Institution and the Maryland State Legislature, *Appellees*.

TIMOTHY PATRICK O'CONNOR, *Appellant*,

v.

STATE OF MARYLAND, Director of Patuxent Institution, *Appellees*.

GEORGE L. CRESWELL, *Appellant*,

v.

DIRECTOR, PATUXENT INSTITUTION, *Appellee*.

Nos. 9094, 9095, 9096, 9098, 9143.
United States Court of Appeals Fourth Circuit.

Argued Nov. 6, 1963.

Decided June 16, 1964.

Before BOREMAN and J. SPENCER BELL, Circuit Judges, and CRAVEN, District Judge.

J. SPENCER BELL, Circuit Judge.

This is a consolidated appeal of five petitions for writs of habeas corpus filed by five inmates of Maryland's Patuxent Institution wherein they seek to have the Maryland Defective Delinquent Act, Ann.Code of Md., Article 31B (Supp. 1961) [hereinafter the Act], under which they are confined

declared unconstitutional. The petitions were denied by the district court without the issuance of a writ of habeas corpus or show cause order, without requiring the state to file returns, without appointment of counsel for the indigent petitioners and without argument or hearing.[1]

[1–5] The petitioners allege facts which raise serious questions of a non-frivolous nature which concern the constitutionality of the Act. We hold that statute to be facially constitutional; i.e., it is within the power of the state to segregate from among its lawbreakers a class or category which is dangerous to the public safety and to confine this group for the purpose of treatment or for the purpose of protecting the public from further depredations. We remand the case in order that the district court may appoint counsel, issue a show cause order to the State of Maryland, and permit the filing of an answer to the petition. Thereafter, the district court will accord to each petitioner whatever type hearing may be appropriate in accordance with the standards promulgated in Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), and will then determine whether the statute is being constitutionally applied. In addition to any points which counsel may raise, the court should consider and determine whether the statutory definition of a defective delinquent as applied by the Maryland courts is sufficiently definitive to permit its practical application within constitutional limitations; whether the procedures embodied in the statute are applied in such a manner as to afford due process to the accused within the confrontation requirements of the sixth amendment; whether the proposed objectives of the Act are sufficiently implemented in its actual administration to support its categorization as a civil procedure and justify the elimination of conventional criminal procedural safeguards, Ken-

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[1] The district court has upheld the constitutionality of the Act in a number of brief memorandum opinions which refer to the opinions of the Maryland Court of Appeals without any attempt independently to analyze the many serious questions of federal constitutional law involved. Brown v. Allen, 344 U.S. 443, 506, 73 S.Ct. 397, 97 L.Ed. 469 (1953). The Maryland court has considered the constitutionality of the Act in more than thirty cases in which all aspects of the issue have been discussed. See especially Blizzard v. State, 218 Md. 384, 147 A.2d 227 (1958); Eggleston v. State, 209 Md. 504, 121 A.2d 698 (1956), and other cases cited herein.

nedy v. Mendoza-Martinez, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963); whether the interpretation and application of the statutory requirement that a defective delinquent be found to be "an actual danger to society" may within the eighth amendment's prohibition against cruel and unusual punishment include those whose conduct indicates no more than a danger to property rights as distinguished from violence to the person; whether Patuxent does in fact furnish treatment for treatable defective delinquents as distinguished from other lawbreakers which would support the Act under the equal protection clause of the fourteenth amendment. Only when these and any other questions raised by the petitioners at the hearing are answered can the requirements of Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963), and Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745 (1963), be satisfied.

The Defective Delinquent Act of Maryland is the end result of a series of studies made in Maryland between 1948 and 1950. In 1947 the Legislature authorized and directed the Governor to appoint a commission consisting of doctors, judges, psychiatrists, psychologists and lawyers to study the problems of medico-legal psychiatry raised by recidivism. On December 28, 1948, the commission completed its work and submitted a report.[2]

Meanwhile, the Maryland Board of Correction had appointed a special advisory committee of seven eminent psychologists and psychiatrists to study the same general problem, and this committee rendered its report in January 1949. Ultimately, the two groups made a joint recommendation that a new institution should be set up for "criminal mental and emotional defectives", such institution to include a unit to function as a diagnostic clinic. It further recommended an indeterminate sentence law for criminal

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[2] The history and objectives of the statute are to be found in Research Report No. 29, Research Division of the Legislative Council of Maryland (December 1959). See also: Report of the Commission to Study and Re-Evaluate Patuxent Institution, Legislative Council of the General Assembly of Maryland (January 25, 1961); Report of the Commission to Study Medico-Legal Psychiatry submitted to Governor William Preston Lane, Jr., and the Maryland General Assembly, December 28, 1948; Address on Defective Delinquency, Honorable Jerome Robinson, House of Delegates of Maryland, Delivered to the General Assembly of the Council of State Governments, December 5, 1958.

defectives to fulfill the purposes of the new institution. Thereafter, the Legislative Council of Maryland appointed a Committee on Medico-Legal Procedure, charged with the responsibility of making a study of the joint recommendations of the commission and the committee, and of drafting the proposed legislation. In 1951, the bill prepared by this committee was passed by the Legislature with a few minor amendments as the Defective Delinquent Act of Maryland and codified as Article 31B of the Annotated Code of Maryland (1951).

The first four sections of the Act provide for the establishment of the Patuxent Institution, the composition of its staff and its general administrative organization. It requires that the Director be a psychiatrist of at least five years experience in practice or teaching. Two of the Associate Directors must be psychiatrists with at least three years experience. An operating staff of psychiatrists, social workers, psychologists and sociologists is provided to operate the diagnostic clinic and to provide the treatment for the inmates of Patuxent.

Section five, the heart of the Act, defines the term defective delinquent as follows:

"DEFECTIVE DELINQUENTS

"§ 5. Defined.

> "For the purposes of this article, a defective delinquent shall be defined as an individual who, by the demonstration of persistent aggravated antisocial or criminal behavior, evidences a propensity toward criminal activity, and who is found to have either such intellectual deficiency or emotional unbalance, or both, as to clearly demonstrate an actual danger to society so as to require such confinement and treatment, when appropriate, as may make it reasonably safe for society to terminate the confinement and treatment."

The remainder of the Act provides, in essence, that persons convicted of specified offenses may be thereafter tried as defective delinquents and if found to be such may be confined for an indeterminate period.

Section 6(a) lists the offenses conviction of which will subject one to trial for being a defective delinquent. It

includes: (1) felonies; (2) serious misdemeanors; (3) crimes of violence; (4) certain sex crimes; and (5) two or more convictions for any offenses or crimes punishable by imprisonment in a Maryland criminal court. These classifications include both felons and rogues, vagabonds and other offenders against property. See, e.g., Reed v. Warden, 212 Md. 645, 129 A.2d 92 (1957) (rogue and vagabond). See generally Brumbaugh, *A New Criminal Code for Maryland?*, 23 Md.L.Rev. 1 (1963).

A convict may be examined for possible defective delinquency upon the request of the Department of Correction, the prosecuting State's Attorney in the criminal case, the convict or his attorney, or the convicting criminal court, "on any knowledge or suspicion of the presence of defective delinquency." Act, Section 6(b). This request may only be made if the convict has been sentenced to or is then serving a criminal sentence in a state penal institution. Act, Section 6(c). The request is filed with the convicting criminal court, which thereafter retains jurisdiction over the defendant. Act, Sections 6(d), (e).

After the examination is ordered, the convict suspected of defective delinquency is transferred to Patuxent Institution and examined by a medical physician, a psychiatrist and a psychologist, who on the basis of their examination and study of the suspected defective delinquent and the circumstances of the originating crime, copies of any probation or other reports about him, and reports as to his social, physical, mental and psychiatric condition and history determine whether the suspected person is or is not a defective delinquent. Act, Section 7(a).

[6–9] If the institutional report states that the suspected person is a defective delinquent, he is brought before the criminal court which sentenced him and is entitled to counsel of his choice and a jury trial. The right to speedy trial under the sixth amendment and Article 21 of the Maryland Declaration of Rights does not apply. McCloskey v. Director, 230 Md. 635, 187 A.2d 833 (1963). At the defective delinquency determination hearing, the state has the burden to establish, by a preponderance of the evidence, and not beyond a reasonable doubt, that the criminal is a defective delinquent. Purks v. Director, 226 Md. 43, 171 A.2d 726 (1961); Blizzard v. State, 218 Md. 384, 147 A.2d 227 (1958).

If a jury is prayed, the jury is judge of the fact only and not of law and fact, as in criminal cases under the Maryland Constitution, Article 15, Section 5. Blizzard v. State, supra. The defendant may not argue law to the jury, as in criminal cases. Purks v. Director, supra.

[10–12] The state's evidence at the hearing is essentially that of expert witnesses, whose "expert findings and conclusions are to be accorded very serious consideration, particularly in a case such as this one, when the trial court almost necessarily must rely to a considerable degree on the opinions of expert witnesses." Palmer v. State, 215 Md. 142, 152, 137 A.2d 119, 125 (1957). See Purks v. State, 226 Md. 43, 171 A.2d 726 (1961). The institutional experts who testify for the state are not in a patient-physician relationship with the criminal and may testify as to matters learned from the criminal in interviews and tests, even if the same concerns prior criminal offenses and convictions and admissions of prior antisocial conduct. Simmons v. Director, 227 Md. 661, 177 A.2d 409 (1962); McDonough v. Director, 229 Md. 626, 183 A.2d 368 (1962); Purks v. State, supra. Extensive hearsay regarding the past social, physical, mental and psychiatric and criminal condition and history is admitted at the hearing over objection, since it is deemed that the Act requires the introduction of the same and that the purpose of the law would be defeated unless evidence of antecedent conduct is presented upon which to establish the propensity toward criminal activity. Simmons v. Director, supra; Fairbanks v. Director, 226 Md. 661, 173 A.2d 913 (1961).

[13] The psychiatrist of the criminal's own choice, which must be furnished him by the state upon request, is not in the position of a medical expert in an adversary proceeding. He is considered to be "independent." He is required to submit a written report of his examination and findings to the court for consideration by the trier of fact. The defendant has no control over the admission of the report of this independent psychiatrist and the physician-patient relationship does not apply. Simmons v. Director, supra.

[14] Defendant's counsel has access to the records and reports of Patuxent (and of the "independent" psychiatrist) which, presumably, he can put into evidence just as

can the state. Act, Section 8. The defendant also has discovery procedures available to him pursuant to the Maryland Rules of Civil Procedure. Purks v. State, 226 Md. 43, 171 A.2d 726 (1961).

[15] At a determination hearing the sole issue is "whether the person is a defective delinquent as defined in § 5." Act, Section 8(c). The trier of fact is precluded from considering whether treatment will aid defendant and whether any is available. Purks v. State, 226 Md. 43, 50, 171 A.2d 726 (1961); Queen v. Director, 226 Md. 664, 174 A.2d 351 (1961).

If the defendant is found not to be a defective delinquent, he is returned to the custody of the Department of Correction under his original criminal sentence, with credit for time spent in Patuxent and credit for behavior at Patuxent pursuant to the provisions of the state criminal code. Act, Section 9(a); Ann.Code of Md., Article 27, Section 688 (Supp.1962).

[16] If the defendant is found to be a defective delinquent, the court is required to commit him to the Patuxent Institution, "for an indeterminate period without either maximum or minimum limits" and the sentence for the originating crime is suspended. Act, Section 9(b). The defective delinquent convict can be incarcerated at Patuxent Institution after his originating criminal sentence has expired, the purpose of his confinement being not to punish, but to receive "such confinement and treatment, when appropriate, as may make it reasonably safe for society to terminate the confinement and treatment." Act, Section 5. If he should escape this confinement, even if his originating criminal sentence has expired, he is guilty of the crime of escape under the provisions of the criminal code, Ann. Code of Md., Article 27, Section 139 (Supp.1963). See McCloskey v. Director, 230 Md. 635, 187 A.2d 833 (1963); Caparella v. State, 214 Md. 355, 135 A.2d 311 (1957).

During incarceration at Patuxent, the Institutional Board of Review may request the original criminal court to reinstate and reimpose the original criminal sentence upon the defective delinquent, who is then thereafter imprisoned in a penal institution, though he is still a defective delinquent. Act, Section 13(d).

Any person in the custody of the Patuxent Institution

may be transferred by administrative decision, without a hearing, to the Department of Correction for imprisonment. Act, Section 16(d). This administrative transfer to a penal institution for imprisonment may take place regardless of whether the originating criminal sentence has expired. A convict sentenced to a determinate criminal sentence could, after defective delinquency determination, spend the rest of his life in the penitentiary.

During Patuxent confinement, the defective delinquent is subject to the term of his suspended original criminal sentence, and if released prior to its expiration, may be required to serve the remainder of that sentence. Act, Sections 10(a), 13(f).

While it is clear that a Patuxent inmate is subject to immediate and actual physical confinement without maximum or minimum limits, there is no requirement that he be given treatment unless the same is "appropriate." Act, Section 5. See Purks v. State, 226 Md. 43, 171 A.2d 726 (1961).

The Institutional Board of Review is required to review and re-examine each defective delinquent annually, utilizing examination procedures used in the first determination, and make a recommendation for the future status and treatment of each inmate so reviewed. Act, Section 13(b).

After a defective delinquent has been confined for two-thirds of his original criminal sentence or for a period of two years, whichever is longer, he may file a petition for redetermination of his defective delinquency. Act, Section 10(a). If the inmate is found not to be a defective delinquent, the court may discharge him from confinement or commit him under his original criminal sentence with credit for time spent at Patuxent and credit for behavior at Patuxent pursuant to the provisions of the criminal code. Act, Section 10(a); Ann.Code of Md., Article 27, Section 688 (Supp.1962). If the inmate is found to be a defective delinquent, excepting his application for leave to appeal, he is denied further petitions for review until intervals of not less than three years have elapsed. Act, Section 10(b).

[17] The Act expressly saves the writ of habeas corpus to the defective delinquent, the Act, Section 10(c), who also has a post conviction remedy pursuant to the criminal code, Ann.Code of Md., Article 27, § 645A (Supp.1959). In neither proceeding can the defective delinquent raise the

question of his defective delinquency on the merits. See Brown v. Director, 224 Md. 635, 165 A.2d 895 (1960), cert. denied, 365 U.S. 859, 81 S.Ct. 830, 5 L.Ed.2d 825 (1961).

The State's brief explains the objectives of the Act: "The Maryland Defective Delinquency Act is expressly designed to apply to that borderline group of individuals who, though found to be legally sane, are mental or emotional defectives, or both. Under the Act, these individuals adjudged defective delinquents, would be incarcerated not for the purpose of punishment or deterrence, but for treatment and for the protection of society during the period that they were undergoing such treatment."

It is obvious, however, from the statistics to date, that the justification for the Act may not rest solely or even primarily, on the theory that all defective delinquents will receive treatment or that the majority of the inmates who do will be greatly benefitted or cured by treatment. Certainly this is true for the foreseeable future unless unanticipated increases in staff and break throughs in the science of psychiatry make great changes in the amount and efficacy of diagnosis and treatment possible. Many of the inmates will, therefore, in all likelihood, be confined for life on the premise that they are untreatable or incurable but, nevertheless, too dangerous either to life or to property to be released in a free society.[3]

The petitioners attack the Act on several constitutional grounds. First it is contended that the definition of the defective delinquent as set forth in the statute is too vague both as to the class of persons who fall within the Act and the applicable tests to ascertain guilt to constitute valid legislation.

[18, 19] We cannot agree that the statutory definition upon its face is unconstitutional. The subject matter of the

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[3] Report of Commission to Study and Re-evaluate Patuxent Institution, Legislative Council of the General Assembly of Maryland (January 25, 1961). See the report of The Committee of the American Psychiatric Association on Patuxent Institution appended to the commission report at page 49 wherein the committee said:

"From the standpoint of social policy, the Defective Delinquent Law is primarily concerned with the protection of society, secondarily with the rehabilitation of antisocial persons by means now developed by psychiatry, psychology and the social sciences."

statute—the health, welfare and safety of the people of Maryland—is within the area of the police power of the legislature. This being true, only if the Act has not real or substantial relation to that objective—or is palpably and patently an invasion of the individual's constitutional rights —may the courts strike down the Act. Jacobson v. Massachusetts, 197 U.S. 11, 31, 25 S.Ct. 358, 49 L.Ed. 643 (1905). In Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270, 60 S.Ct. 523, 84 L.Ed. 744 (1940), the appellant had filed a writ of prohibition to prevent the probate judge from trying him as a "Psychopathic Personality" under the Minnesota Act.[4] The Minnesota Appellate Court had defined the Act to apply to persons who by an habitual course of misconduct showed an utter lack of power to control their sexual impulses and hence were likely to attack others or otherwise inflict injury. In upholding the statute, as construed by the state court, Chief Justice Hughes held that there was a rational basis for the class selected by the legislature; that the definition was not so vague or indefinite as to constitute invalid legislation and, therefore, the Act was constitutional upon its face. While psychiatrists no longer approve the term psychopath as a definitive medical term, we note that the definition adopted by the Minnesota Appellate Court and approved by the Supreme Court was not dependent upon the medical acceptability of the term psychopath. It is obvious that the Maryland statutory definition was carefully drawn to conform to the definition approved by the Court in the Minnesota case.

[20] The Maryland Court of Appeals, however, has construed the statutory definition to include mentally deficient persons and/or psychopaths who by persistent aggravated anti-social or criminal behavior have clearly demonstrated themselves to be such an actual danger to society as to require confinement. Palmer v. State, 215 Md. 142, 137 A.2d 119, 122 (1957). Whether or not the court's interpretation of the words "emotionally unbalanced" as used in the statutory definition to include "psychopaths"—a term which is not determinable by medical standards alone—has

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[4] The District of Columbia and approximately 20 states have similar statutes. But see: Ch. 10, *The Sexual Psychopath and the Law*, The Mentally Disabled And The Law (Lindman and McIntyre ed. 1961) for criticism of many of these Acts.

rendered the definition too vague to be constitutionally acceptable is a matter which may not be determined without the aid of expert testimony not available on this record. Counsel for the petitioners offer the expert writings of members of the Patuxent staff to show that "emotional unbalance" is such a quantitatively and qualitatively inaccurate term that any person who seeks to apply the definition is forced to depend upon an individual interpretation of the evidence of past antisocial and criminal conduct. Again it is the district court which must provide a record which will offer a solution to this issue.

[21, 22] We must also reject the petitioners' contention that the Act upon its face violates the equal protection clause of the fourteenth amendment. The preoccupation of society with the problems of recidivism and rehabilitation, which show no signs of solution by conventional penological methods, strongly support the efforts of Maryland to seek a new approach. The problem furnishes a rational basis for the legislature's efforts to set apart a group of convicted felons—who were "demonstrably dangerous to society unless cured of their criminal propensities." Eggleston v. State, 209 Md. 104, 121 A.2d 698 (1956). In Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270, 60 S.Ct. 523 (1940), the Court answered this contention as follows:

> "The question, however, is whether the legislature could constitutionally make a class of the group it did select. That is, whether there is any rational basis for such a selection. We see no reason for doubt upon this point. Whether the legislature could have gone farther is not the question. The class it did select is identified by the state court in terms which clearly show that the persons within the class constitute a dangerous element in the community which the legislature in its discretion could put under appropriate control. As we have often said, the legislature is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be the clearest. If the law 'presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied.'" 270 U.S. at 274–75, 60 S.Ct. at 526.

See also Buck v. Bell, 274 U.S. 200, 47 S.Ct. 584, 71 L.Ed. 1000 (1927), where Mr. Justice Holmes writing, the Court upheld the constitutionality of the Virginia Sterilization Law. In rejecting the equal protection argument he said:

> "But the answer is that the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow." 274 U.S. at 208, 47 S.Ct. at 585.

[23] The petitioners also contend that the Act does not provide them with a fair trial in that it denies them procedural due process. An examination of the trial and hearing provisions of the Act can leave no doubt that it places around the accused more procedural safeguards than any of the Acts of a similar nature which have been upheld by the courts against this attack. Not until the convicted felon has been examined and diagnosed by the Patuxent Clinic is he liable to trial under the statute as a defective delinquent. He is entitled to a jury trial with special finding. He must be allowed counsel of his own choice or furnished counsel. He has the power to summon witnesses. He is entitled to be furnished a psychiatrist who is independent of Patuxent. While the sentence prescribed for the defective delinquent is fixed by the law as an indeterminate sentence, it nevertheless requires yearly administrative review of his record by the Patuxent staff and an opportunity to the petitioner at fixed times to have a judicial review of his status. The procedural protection here furnished exceeds that provided in either the Minnesota Psychopathic Personality Statute, or the Virginia Sterilization Act, both of which were upheld by the Supreme Court. In the Minnesota case the Court pointed out that the statute provided for notice and hearing, the right to counsel and to witnesses, and impartial experts to assist in the examination and appeal. There too, the penalty was indeterminate confinement but the Court felt that the right to petition for release was adequate procedural protection for this provision of the Act.

[24, 25] But petitioners attack the trial provided in the Maryland Act on the ground that it departs from the common law rules of evidence in permitting the experts to

testify over objection to hearsay matters either admitted by the petitioner during his clinical examination at Patuxent or collected by the staff from the petitioner's school records or indeed from any source deemed of relevance by the psychiatrist in forming his opinion. They also question the fairness of permitting the experts to express their opinion on the ultimate issue before the jury; i.e., whether the petitioner is a defective delinquent within the meaning of the statute. The petitioners also complain that the statute provides that the state must carry its case only by the greater weight of the evidence. The answer to all of these objections is that with respect to state action repeated decisions of the Supreme Court have put it beyond the range of further debate that the "due process" clause of the fourteenth amendment has not the effect of imposing upon the states any particular form or mode of procedure, so long as the essential rights of notice and a hearing, or opportunity to be heard, before a competent tribunal are not interfered with. Frank v. Mangum, 237 U.S. 309, 340, 35 S.Ct. 582, 59 L.Ed. 969 (1915). Thus the Supreme Court has ruled that trial by jury may, by a state, be modified or abolished altogether; so also compulsory incrimination, Twining v. New Jersey, 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 97 (1908), and double jeopardy, Palko v. Connecticut, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 (1937). Care, however, should be taken to read these cases in the light of the Court's more recent decisions beginning with Gitlow v. New York, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138 (1925), in which the Court has broadened the concept of liberty contained in the fourteenth amendment and thus has brought to bear on the states the constitutional requirement of fundamental fairness contained in many sections of the Bill of Rights not theretofore thought to apply to them. See Gideon v. Wainwright, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), and at pages 345–47, 83 S.Ct. at pages 797–98, where Mr. Justice Douglas in a concurring opinion reviews the history of this process. See also Robinson v. California, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962) and Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d. 1081 (1961).

[26, 27] It would, therefore, appear that the Act upon its face provides adequate procedural safeguards; indeed it throws around the accused many safeguards not ordinarily

found in so-called civil proceedings. By examining the records of the actual trials of the petitioners, the district court can determine whether in application these safeguards result in basic fairness of procedure imposed upon the state by the fourteenth amendment. We are not here speaking only of the "perfection of the machinery for correction" which may be referred to as procedural due process. Fay v. Noia, 372 U.S. 391, 421, 83 S.Ct. 822, 839 (1963); Cf. Moore v. Dempsey, 261 U.S. 86, 90–91, 43 S.Ct. 265, 67 L.Ed. 543 (1923).[5]

Finally, we again caution that we are here concerned only with the constitutionality of the Maryland statute upon its face. We are fully aware of the dangers inherent in the application of this new and radical approach in the present state of medico-legal knowledge of the problems of crime and recidivism. In its essence, the statute rejects the age old concept that every legally sane person possesses in equal degree the free will to choose between doing right and doing wrong. Instead, it substitutes the concept that there is a category of legally sane persons who by reason of mental or emotional deficiencies "evidence a propensity toward criminal activity," which they are incapable of controlling.[6] For those in the category who are treatable it would substitute psychiatric treatment for punishment in the conventional sense and would free them from confinement, not when they have "paid their debt to society," but when they have been sufficiently cured to make it reasonably safe to release them. With this humanitarian and progressive approach to the problem no person who has deplored the inadequacies of conventional penological practices can complain. But a statute though "fair on its face and impartial in appearance" may be fraught with the possibility of abuse in that if not administered in the spirit in which

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[5] Insofar as the basic constitutional rights of the parties to due process are concerned, the arguments as to whether the Act is civil or penal in nature are futile exercises in semantics. An Act which deprives sane men of their liberty by confining them under severe discipline with or without treatment requires a basic fairness of procedure and substance—"implicit in the concept of ordered liberty"—to comport with the guaranties of our National Constitution. By these standards, the Supreme Court reviewed the Minnesota statute which concededly is as civil in nature as the Maryland statute.

[6] GLUECK, LAW AND PSYCHIATRY (1962).

it is conceived it can become a mere device for warehousing the obnoxious and antisocial elements of society.[7] Many of the inmates in Patuxent are there by reason of offenses against property rights. Many jurists and laymen would seriously question the wisdom of the practice of indefinitely confining young men under these circumstances. Deficiencies in staff, facilities, and finances would undermine the efficacy of the Institution and the justification for the law, and ultimately the constitutionality of its application.

[28] The petitions should be reconsidered by the district court and since they are pro se petitions they should be construed liberally. Darr v. Burford, 339 U.S. 200, 203–04, 70 S.Ct. 587, 94 L.Ed. 761 (1950).

The creation of a non-medically determinable category of persons who may be confined for indeterminate periods by a civil proceeding is so serious a departure from traditional concepts of justice that it deserves a critical analysis on the broadest of terms after a careful factual development of its present operation. Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745 (1963).

Remanded.

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[7] The 1961 Report of the Commission to Study and Re-Evaluate Patuxent Institution raises many of the problems which must be frequently reviewed while sufficient experience accumulates to make a final judgment.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13,415

CHARLES MASON TIPPETT, *Appellant*,

v.

STATE OF MARYLAND, and Director of Patuxent Institution, *Appellees*.

No. 13,421

ALBERT DELANOR MUREL, *Appellant*,

v.

BALTIMORE CITY CRIMINAL COURT, and Director of Patuxent Institution, State of Maryland, *Appellees*.

No. 13,426

ROBERT HAYES, JR., *Appellant*,

v.

HAROLD M. BOSLOW, M.D., Director, Patuxent Institution, *Appellee*.

No. 13,433

WILLIAM R. MONROE, *Appellant*,

v.

DIRECTOR OF THE PATUXENT INSTITUTION, and State of Maryland, *Appellees*.

No. 13,434

BRADLEY ARLINGTON AVEY, *Appellant*,

v.

STATE OF MARYLAND, Harold M. Boslow, as Director of Patuxent Institution, and Vernon L. Peppersack, as Commissioner, State Department of Corrections, *Appellees*.

No. 13,441

GEORGE L. CRESWELL, *Appellant*,

v.

DIRECTOR, PATUXENT INSTITUTION, *Appellee*.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE. R. DORSEY WATKINS, DISTRICT JUDGE.

(Argued May 8, 1972. Decided January 4, 1971).
Before HAYNSWORTH, Chief Judge, SOBELOFF, and BUTZNER, Circuit Judges.

Karl Feissner and Andrew E. Greenwald (Court-assigned counsel) [William L. Kaplan, Thomas P. Smith, Fred R. Joseph; and Feissner, Kaplan and Smith on brief] for Appellants, and Alfred J. O'Ferrall, III, Assistant Attorney General of Maryland, (Francis B. Burch, Attorney General of Maryland, and Edward F. Borgerding, Assistant Attorney General of Maryland, on brief) for Appellees, and Curtis R. Reitz (Richard L. Bazelon on brief) for Amicus Curiae.

HAYNSWORTH, Chief Judge:

These consolidated appeals arise from a previous order of this Court [1] in which we directed the District Court to determine, after a full hearing, numerous questions involving the application of the Maryland Defective Delinquents Act.[2] Following an extensive series of hearings, and on consideration of the record of equally thorough proceedings in the state courts,[3] the District Court dismissed the petitions.

The petitioners contend that, as applied, the Act is constitutionally deficient in the following respects:

1. The definition of defective delinquency is too vague to be susceptible to any objective medical or legal application, and in fact defective delinquency is not determined on an objective basis;

2. The examination procedures offend due process in that (a) a person suspected of being a defective delinquent is not given prior notice of the request for examination, nor is he given an opportunity to contest the order referring him for examination; (b) he is required to submit to personal interviews with institu-

[1] Sas v. State of Maryland, 4 Cir., 334 F.2d 506. The original petitioner is no longer a party to these proceedings. He was found to have responded favorably to treatment and was released from confinement. He did not join in this appeal.

[2] Annotated Code of Maryland, Article 31B.

[3] See Director of Patuxent Institution v. Daniels, 243 Md. 16, 221 A.2d 397.

tional psychiatrists, with a resulting risk of self-incrimination; and (c) he is not allowed to have an attorney present during the examination process;

3. The procedures for judicial determination of defective delinquency offend due process in that (a) hearsay evidence is admitted; (b) the state is not required to prove beyond a reasonable doubt, but only by a preponderance of the evidence, that the subject is a defective delinquent; (c) the indeterminate period of confinement, substituted for a previously imposed sentence of imprisonment for a term of years when a person is found to be a defective delinquent, violates the constitutional protection against double jeopardy;

4. The Act violates the prohibition against cruel and unusual punishment by including within its scope those persons whose conduct indicates a danger only to property rather than danger of violence to the person; and

5. Patuxent Institution lacks sufficient staff, facilities and finances to effectuate the purposes of the Act and, in consequence of these deficiencies, has failed to provide treatment as contemplated by the Act, thus depriving it of its character as a mental health institution and rendering it no more than a warehouse for obnoxious and antisocial elements of society.

[1] The District Court considered each of these contentions in detail and found that the present application of the Act does not operate to deny any of the petitioners' constitutional rights. We affirm on the District Court's opinion. Sas v. State of Maryland, D.Md., 295 F.Supp. 389.

The Defective Delinquents Act is the outgrowth of Maryland's dissatisfaction with the result of more conventional methods of dealing with habitual criminal offenders. In 1948 and 1949 two special commissions, one consisting of lawyers, judges, physicians, psychiatrists and psychologists appointed by the Governor, and the other made up of psychiatrists and psychologists appointed by the Board of Corrections, made studies of the medical and legal aspects of recidivism in an effort to suggest a more effective method of coping with the problem. The result of the studies was a joint report recommending that a separate institution be

established for "criminal mental and emotional defectives" with a diagnostic clinic to determine what persons were susceptible to specialized treatment in the institution. In 1951 the recommendations were adopted by the legislature. Patuxent Institution was established to house and care for defective delinquents, defined by the statute as including any

> "individual who, by the demonstration of persistent aggravated antisocial or criminal behavior, evidences a propensity toward criminal activity, and who is found to have either such intellectual deficiency or emotional unbalance, or both, as to clearly demonstrate an actual danger to society so as to require such confinement and treatment, when appropriate, as may make it reasonably safe for society to terminate the confinement and treatment." [4]

The Act sets up a comprehensive scheme for referral, examination, commitment, treatment and release of persons suspected of being defective delinquents. A request for examination may be made only after the imposition of an active prison sentence upon a defendant's conviction of one of several enumerated classes of criminal offenses.[5] Examinations may be requested by the prosecutor, the Department of Correction, the trial judge on his own motion, or the defendant himself.[6] An order referring a defendant for examination is not reviewable. Once at Patuxent, the prisoner is examined by a physician, a psychiatrist and a psychologist, who are required to furnish a report to the committing court stating whether or not they believe him to be a defective delinquent. If the report is negative, he is returned to a penal institution to complete service of his sentence, with full credit for the time spent at Patuxent.[7] If the examiners believe him to be a defective delinquent, he is afforded a full and prompt judicial hearing, at which he is entitled to the assistance of retained or appointed

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[4] Annotated Code of Maryland, Article 31B § 5.

[5] Id., § 6(a).

[6] Id., § 6(b).

[7] Id., § 7(a).

counsel[8] and to receive a trial by jury.[9] He is allowed full access to all records, reports and papers in the possession of the institution or the court, including the report made by the independent, private psychiatrist who, on the prisoner's request, may be appointed to examine him at the expense of the state.[10] If he is found to be a defective delinquent he is committed to Patuxent for an indeterminate period, with the right of judicial review of his classification after the expiration of the greater of two years or two-thirds of his original sentence, and thereafter at three year intervals. Appellate review of any court order subsequent to the original referral for examination is provided.[11]

In addition to periodic judicial determinations, the Act requires review of each inmate's classification by the Institutional Board of Review not less than once each year.

The Board has the power to grant paroles or leaves of absence at any time, or to report to the committing court if it concludes that an inmate need no longer be classified as a defective delinquent.[12] If the court concludes that his condition is so improved that confinement at Patuxent is no longer required, it may order him returned to the Department of Correction to complete service of the original sentence with full credit for the time spent at Patuxent, order him released conditionally on parole or leave of absence,

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[8] Id., § 8(a), (b).

[9] Id., § 8(e).

[10] Id., §§ 7(b), 8(b).

[11] Id., §§ 11, 11A. Although the time limitation on initial judicial reappraisal of an inmate's status is of considerable length in the case of a long original sentence, the writ of habeas corpus is available without time limitations, and it is expressly preserved to inmates of Patuxent by § 10(c) of the Act. In addition, the Board of Review may seek judicial reappraisal of an inmate's status at any time, pursuant to § 13(f).

[12] Id., § 13(b), (d). Leaves of absence can be tailored by the Board of Review to meet individual needs. The leaves may range in length from a few days holiday leave, through longer periods designed to provide a basis for determining whether the inmate's social interactions have significantly improved, to a full year's leave to permit an inmate to live and work as a normal member of society, but subject to observation and supervision. In addition, a "live-in work-out" program has been devised to aid some inmates in coping with the transition between inmate status and full release. A "halfway house" has also been established to assist in the transition.

or order him released unconditionally, whether or not the original sentence would otherwise still be in effect.[13]

[2] Critical to the appellants' argument is the premise that, without regard to the terminology used, Patuxent is in fact a penal institution, and the proceedings for determination of defective delinquency are equivalent in practice to criminal prosecutions. Almost without exception, their various contentions rest on this foundation.[14] The District Court's rejection of this basic contention, which we affirm, of necessity defeats their arguments. As written by the legislature, construed by the courts, and applied by the staff, the Act selects a medically and legally recognizable class of persons for special treatment.[15] Although criminal conduct is necessarily bound up in every case, the inquiry does not focus on particular criminal acts but on the mental and emotional condition of the person thought to be a member of the statutorily defined class. It is that, and no other factor, which ultimately determines his classification and treatment. In this context, the denomination of the

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[13] Id., § 13(f).

[14] One contention which does not rest on this foundation is the claimed impropriety of including within the statutory class those persons who have demonstrated only a propensity for committing crimes carrying no danger of violence to the person. That question is not properly before us. Although the statute as construed permits this classification, the District Court found as a fact that it is not so applied at the present time. None of these petitioners, nor any other person now confined at Patuxent, was classified as a defective delinquent solely on the basis of a propensity to commit only "property crimes." The staff, as a matter of policy, does not recommend for classification as defective delinquents any such person. To the extent that a propensity to commit "property" crimes as well as a predisposition to violence or threats of violence may have been a factor in the classification of some of the petitioners, we can perceive no reason why the treatment provided at Patuxent should not be as beneficial in combatting that propensity as it is in dealing with more violent manifestations of mental disorder, nor why the state's interest in treating it is any the less legitimate. The question raised by the petitioners need not be resolved unless and until the evaluation policies in effect at Patuxent are changed to make operative the classification of which they complain.

[15] In Schreiber, Indeterminate Therapeutic Incarceration of Dangerous Criminals: Perspectives and Problems, 56 Va.L.R. 602, it is suggested that the statutory definition of "defective delinquent" should be made more specific. Although we recognize the risk of vagueness inherent in the terminology employed, an attempt to make precise legal definitions of medical concepts embodies a risk of over-definition. We do not think that the definition now used is so vague as to offend due process.

proceedings as civil rather than criminal is not a semantic exercise but a factual description of what occurs. The procedural safeguards erected by the statute are adequate to meet present needs and to protect the petitioners' constitutional rights.

In sum, the Act represents an enlightened and progressive experiment aimed at rehabilitating persons whose anti-social activities are occasioned, at least in part, by mental disorders. The present administration of the Act demonstrates a sincere and vigorous attempt to effectuate its policies. By the petitioners' own account, the state has expended to date $28,000,000 for plant and facilities at Patuxent. Legislative appropriations for its operation have continuously increased, not only in absolute terms but also for each inmate and as compared with the appropriations for operating regular penal institutions. Currently the appropriations per inmate are three times the amount allocated to the Reformatory, four times that provided for the House of Correction, and five times the amount allotted for the Penitentiary. Improvements in and expansion of staff, therapeutic facilities, vocational and educational training, and out-patient services continue.[16] There is reason to believe that the effort may prove successful. Based on the figures available from its brief operation, the recidivism rate from Patuxent, which deals with a population composed entirely of confirmed recidivists, is lower than the combined rate for all of the penal institutions in the United States.

We recognize that many problems remain and that there are many areas of possible improvement. For example, it might prove fruitful to permit the independent psychiatrist to participate in the proceedings at an earlier stage than is presently allowed; his participation in staff conferences may be beneficial to the staff and to the inmate he examines. But, in this comparatively new field of medical rehabilitation, experience is more likely than fiat to suggest constructive avenues for change.

Mr. Chief Justice Burger has taken the lead in pleading

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[16] Presently the staff at Patuxent includes ten psychiatrists, ten psychologists and fourteen social workers for approximately 350 inmates. The total psychiatric staff of all other corretcional institutions in the entire United States is about fifty. See *Schreiber*, supra, note 35 at 607.

for a reformation of our correctional system, which, in general, is woefully deficient in its rehabilitative function. Too many prisoners serve their allotted time and are released into society with the same predisposition to anti-social conduct as they had before their arrests. In all too many instances, imprisonment serves the converse of the rehabilitative purpose, converting good prospects for rehabilitation into hardened criminals. The result, of course, is a grave wrong for those convicts who could be helped by getting help. It is a grave wrong to society, which must suffer their continued depredations when released from prison until they are confined again.[17]

The interests of society and of the prison population demand the sort of innovative reappraisal of our correctional institutions, their practices and procedures, for which the Chief Justice has pled. At the very least, Patuxent is an encouraging example of one kind of approach to a solution of these difficult problems. Time is required to appraise its ultimate effectiveness, but there is firm foundation for hope that it will prove a material and positive step toward the rehabilitation of mental and emotional defectives, and the protection of society from those anti-social defectives who are beyond rehabilitation.

The approach of Maryland's Defective Delinquent Act is essentially a medical approach, but the clear promise it has demonstrated would be withdrawn should it be held, as the petitioners contend, that the diagnostic and treatment processes must be converted into an adversary legal process in which the patient is entitled to all the constitutional protections available to a defendant in a criminal proceeding. It is difficult to imagine anything more stultifying to a psychiatrist, as dependent as he is upon the cooperation of his patient, than the presence of a lawyer objecting to the psychiatrist's questions and advising his client not to answer this question and that. The injection of broad legal restraints into the diagnostic and treatment procedures that would deny Patuxent's substantial prospect for improvement over our earlier practices might well restrain most other experimentation looking toward conversion of

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[17] See United States v. Chandler, 4 Cir., 393 F.2d 920, 927-929.

our correctional institutions into effective rehabilitating agencies.[18]

The suggestion in the dissenting opinion that counsel be brought into the proceedings to a limited extent at an earlier time, like our similar suggestion with respect to the private psychiatrist, may have merit as one for future trial and experimentation. Its concededly tentative nature, in light of the uncertainties permeating this field of knowledge, however, hardly leads to the conclusion that it presently is an absolute requirement of the due process clause. The question before us is whether the procedures embodied in the statute meet the minimal requirements of the Constitution. In the appraisal of that question, settled notions of the essential elements of fairness play a great part, but the fact that we can conceive of tentative avenues for future trial experimentation to determine their impact upon the fairness of the procedures does not support a conclusion that our hesitant suggestions are already clad in the full regalia of due process.

[3] The burden of persuasion is in the same category. We might all be happier had it been stated in terms of clear and convincing proof rather than in terms of a preponderance of the evidence. However meaningful the distinction may be to us as judges, however, it is greatly to be doubted that a jury's verdict would ever be influenced by the choice of one standard or the other. We all know that juries apply the preponderance standard quite flexibly, depending upon the nature of the case. In any event, in the present state of our knowledge, choice of the standard of proof should be left to the state. A legislative choice of the preponderance standard, the same standard governing civil commitments of mentally ill persons who have no history of criminality, ought not to be held in violation of due process requirements when we have no firm foundation for an evaluation of the practical effects of the choice.

[4] Since the Act's provision for judicial review of a defective delinquent's initial commitment to Patuxent and

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[18] We do not suggest that our disposition of these cases should be taken as a final and unalterable evaluation of all Constitutional questions which may arise out of the Act's administration. We would not consider ourselves bound by today's decision in a future case if later experience should show serious unfairness in the administration of the Act.

his continued confinement there are adequate, we conclude that the Constitution does not require that the procedures under the Act be treated as if they were criminal proceedings subject to the self-defeating strictures which the Constitution appropriately throws around the shoulders of defendants facing criminal charges in adversary legal proceedings.

Affirmed.

SOBELOFF, Circuit Judge (concurring in part and dissenting in part):

I am enabled to concur in part with my brethren largely because of their explicit statement in footnote 18 that:

> We do not suggest that our disposition of these cases should be taken as a final and unalterable evaluation of all Constitutional questions which may arise out of the Act's administration. We would not consider ourselves bound by today's decision in a future case if later experience should show serious unfairness in the administration of the Act.

This is a wise and necessary reservation and deserves emphasis, for as Judge Bell observed in Sas v. State of Maryland, 334 F.2d 506, 516 (4th Cir. 1964), the Act is "fraught with the possibility of abuse * * * if not administered in the spirit in which it is conceived * *."

One of the issues we should consider open for future evaluation is the adequacy of treatment at Patuxent. Our approval of the Maryland Defective Delinquent Act is grounded partly on the assumption that the state will continue to furnish Patuxent with sufficient funds, personnel and facilities to justify realistic hopes of rehabilitating its inmates. Any future review must appraise not only the general treatment program, but whether the particular prisoner before the court is receiving the benefits of Patuxent's program. It does him no good if there is a program of treatment, but it has been arbitrarily withheld from him.[1]

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[1] *See* Rouse v. Cameron, 125 U.S.App.D.C. 366, 373 F.2d 451 (1966), and Millard v. Cameron, 125 U.S.App.D.C. 383, 373 F.2d 468 (1966), where Judge

Notwithstanding the District Court's finding that treatment at Patuxent is presently adequate, this remains an undeniably difficult case. The majority dismisses petitioners' serious constitutional challenges by the simple expedient of labeling the defective delinquency proceedings "civil." But the attempt to sidestep constitutional issues by asserting that the process is "noncriminal" was disapproved by this court in *Sas, supra,* as a "futile exercise in semantics" and has been expressly rejected by the Supreme Court as insufficient justification for disregarding the strict safeguards accorded in criminal cases.[2] As that Court recently noted in the context of the juvenile process: "[C]ivil labels and good intentions do not themselves obviate the need for criminal due process safeguards * * *." In re Winship, 397 U.S. 358, 365–366, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970).

The guarantees constitutionally required in criminal prosecutions are dictated by the severity of the sanctions imposed, which may deprive an individual of his liberty. The consequences of commitment under the Patuxent scheme are hardly less onerous. Patuxent inmates are involuntarily confined under maximum security conditions. Some may remain at Patuxent in a prison-like environment for life because they are deemed too dangerous either to life or to property to be released. As the District of Columbia Circuit has aptly noted:

> [W]hen a determination of "dangerousness" will re-

Baselon discussed the constitutional underpinnings of a "right to treatment" when an individual is involuntarily confined on "humane therapeutic" grounds. *See also* Comment, Civil Restraint, Mental Illness, and the Right to Treatment, 77 Yale L.J. 87 (1967).

[2] *See* In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). In Specht v. Patterson, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967), the Court emphasized the irrelevancy of arbitrary labels in dealing with procedures under Colorado's Sex Offender Act. "These commitment proceedings whether denominated civil or criminal are subject both to the Equal Protection Clause * * * and to the Due Process Clause." 386 U.S. at 608, 87 S.Ct. at 1211. The same thought has been stressed in Heryford v. Parker, 396 F.2d 393, 396 (10th Cir. 1968) (the state has an "inescapable duty to vouchsafe due process" in commitment proceedings for the mentally deficient); and in United States ex rel. Gerchman v. Maroney, 355 F.2d 302, 312 (3rd Cir. 1966) ("due process cannot be satisfied by partial or niggardly procedural protections" in proceedings under Pennsylvania's Sex Offender Act).

sult in a deprivation of liberty, no court can afford to ignore the very real constitutional problems surrounding incarceration predicated only upon a supposed propensity to commit criminal acts. Incarceration may not seem "punishment" to the jailors, but it is punishment to the jailed. Cross v. Harris, 135 U.S. App.D.C. 259, 418 F.2d 1095, 1101–1102 (1969).

Although prisoners are entitled to due process protections regardless of the nature of the proceeding, and the Defective Delinquent Act is in many ways indistinguishable from a criminal statute, an unmodified application of the full procedural safeguards afforded in criminal cases may render the Act unworkable. The Maryland act represents an innovative approach appropriate to deal with an identifiable segment of the criminal population, and until the results can be adequately appraised, some flexibility in the procedures employed by the state is justified. While experiments in penology do not warrant suspending constitutional rights, the unique context in which the Act operates may justify some variation in the manner of their application. However, because the Maryland act bears such close resemblance to the criminal process, the state must make the least drastic departure from the safeguards applicable to criminal proceedings as will avoid destruction of the statutory scheme. The means employed to resolve the dilemma must not sacrifice the essentials of the constitutional safeguards, and the burden of justifying any challenged procedure or practice rests upon the state.[3]

I. RIGHT AGAINST SELF-INCRIMINATION

Upon referral to Patuxent, a prisoner is required to submit to a battery of tests and interrogations by the

[3] In essence, the court is required to examine the Act to determine whether "less drastic means" might be employed to effect the objectives of the state. In the First Amendment area, which in our constitutional system is no less fundamental than individual liberty, the Supreme Court has allowed application of a least drastic means test where a compelling state interest is shown. *See* United States v. Robel, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967); Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960). A no more rigorous doctrine is called for in analyzing the adequacy of the procedural safeguards in commitments under this statutory scheme.

social service staff, a psychiatrist and a psychologist. The statute directs the staff to make inquiry into the crime for which the prisoner has been sentenced and the circumstances surrounding the crime. The interviews also focus on any other crimes and antisocial behavior in his past. There is no contention by the state that the disclosures are voluntary.

The history of petitioner Bradley Avey aptly illustrates the consequences of refusal to submit to the examinations. Avey was committed in December 1965 for an evaluation by the staff. For four years he continuously refused to submit to personal interviews on the ground that his right against self-incrimination would be violated. Consequently he never received a hearing on his defective delinquency status and remained in the receiving ward of the Institution.[4] The case presented by petitioner Avey is not an unusual one. The Institution admits that it has a substantial number of inmates who refuse to submit to the interrogation by the medical and social services staff, and whose judicial hearings are delayed until their cooperation can be achieved. The Director of Patuxent states that an inmate's persistent refusal to be examined could indefinitely postpone any judicial hearing, and result in confinement for the rest of his life. The Maryland Court of Appeals has upheld the legality of this practice. State v. Musgrove, 241 Md. 521, 217 A.2d 247, 252 (1966).[5]

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[4] According to the appellee's brief, p. 23, after the decision of the District Court in this case, Avey was recommended by the Patuxent staff for commitment to Patuxent as a defective delinquent. The record does not disclose whether he finally submitted to interrogation after the adverse decision below or whether the staff proceeded to recommend commitment without his cooperation. In at least one earlier case, the Patuxent staff did recommend an inmate's commitment, despite his consistent refusal to be interviewed. *See* Joint Record Extract, p. 602, Director of Patuxent Institution v. Daniels, 243 Md. 16, 221 A.2d 397 (1966).

Avey's incarceration at Patuxent has not run beyond the original sentence imposed for his underlying criminal conviction. We are thus not faced with a situation where confinement rests solely on a refusal to cooperate. The state would undoubtedly have to bear a heavy burden in justifying extended commitment where there has been no judicial hearing.

[5] The problem of the uncooperative defendant is frequently confronted in psychiatric examinations for competency and criminal responsibility. Sanctions less severe than those imposed at Patuxent have been suggested to induce cooperation. *See* Judicial Conference of the District of Columbia, Report of the

The reluctance of Patuxent inmates to respond to the staff's probing is understandable. Admissions made concerning mental state and past criminal behavior provide significant evidence for the state to use at the judicial hearing on defective delinquency.* The petitioners maintain that they have an absolute right to silence, and cannot be forced to reveal information which may be used against them. But determining defective delinquency involves essentially an inquiry into the state of the inmate's mind. Denied direct access, the state psychiatrists would be relegated to secondhand information in arriving at a diagnosis. In United States v. Albright, 388 F.2d 719 (4th Cir. 1968), this court emphasized the necessity for a government psychiatric examination where the mental condition of a criminal defendant was in issue. It was reasoned that the defendant had waived his right to silence by raising the insanity issue as a defense, but the underlying thrust of the *Albright* opinion was the recognition that a reliable inquiry into the defendant's mental state is possible only with his active cooperation.

With the continuing reservation that this issue is open to further consideration, I agree, for the present, that the

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Committee on Problems Connected with Mental Examination of the Accused in Criminal Cases, Before Trial 107-18 (1966); Note, Pre-Trial Mental Examination and Commitment: Some Procedural Problems in the District of Columbia, 51 Geo.L.J. 143, 152-56 (1962). I reserve opinion as to the constitutionality of confinement at Patuxent without a hearing where the inmate's original criminal sentence has expired.

* It needs to be emphasized that the prisoner is asked to speak of his past in order to gain an insight into his personality, his mind and his emotions, not to entangle him in any criminal prosecution. The District Court expressed a proper concern that disclosures of criminal acts by the inmate might lead to new charges. The court suggested that in such a case the exclusion at any subsequent criminal trial of the inmate's admissions would suffice to protect his constitutional rights. I agree with the court's concern, but would go further. Not only should such disclosures be inadmissible in any criminal proceeding, but they ought not become the predicate for further investigation leading to a prosecution. I would insist that the prisoner is entitled to complete immunity in respect to matters he is compelled to disclose.

There is an additional complication where the prisoner has pending an appeal from his conviction. In no event should any information divulged or evidence developed from information divulged be admissible against the prisoner if a new trial is awarded.

These matters need not be further pursued since they are now before us.

right against self-incrimination cannot be rigidly applied in Patuxent proceeding. I rest, however, not on the asserted ground that the Act is "civil" but that, because of the unusual nature of the necessary inquiries, the legitimate objectives of the legislation would be frustrated were inmates permitted to refuse cooperation. Granting the inmate the right to silence would in many instances thwart the personal examinations and interviews considered indispensable in determining whether the prisoner is or is not a defective delinquent.[7]

II. THE RIGHT OF CONFRONTATION

The records compiled by the Patuxent staff, upon which they rest their conclusions, contain extensive reports from various sources as to the inmate's past criminal and antisocial behavior. These reports are admissible at the judicial hearing, though based on observations and conclusions of persons who do not testify in court. The introduction of this hearsay evidence in a criminal prosecution would unquestionably violate a defendant's right to confront and cross-examine witnesses against him as guaranteed by the Sixth Amendment.[8]

The hazard of hearsay reports is that they may become vehicles whereby false allegations enter the judicial proceedings—allegations which the prisoner may be hard pressed to refute. Although any witness subject to the jurisdiction of the court may be subpoenaed, the prisoner's

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[7] Petitioners' reliance on the Supreme Court's decision in In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) is misplaced for at least two important reasons. The aim of the inquiry in the *Gault* hearings was not to ascertain the mental state of the juvenile, but whether he had committed the specific offense with which he stood charged. Here the inquiry is not intended primarily to prove past criminal conduct, but to assess the inmate's emotional and mental state. Moreover, in *Gault* the Court discounted the state's claim that the juvenile process "rehabilitated" its clients. By contrast, Patuxent, according to the District Court's finding, does engage in a bona fide treatment program.

[8] In Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965) and Douglas v. Alabama, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965), the Supreme Court recognised this right of a defendant under the Sixth Amendment as fundamental and essential to a fair trial and therefore obligatory on the states under the Fourteenth Amendment.

counsel may often be unable to find and produce witnesses to contest reported incidents thus introduced at the judicial hearing.

Yet it must be recognized that a meaningful evaluation of the inmate's mental condition will often depend on an assessment of numerous incidents, some long in the past. If the jury is to be apprised of the considerations underlying the psychiatrists' conclusions without imposing a truly impossible burden on the state authorities, flexibility in departing from strict rules of evidence may be unavoidable. At issue is the subject's entire lifetime behavioral pattern, not whether a certain act was committed. In light of the special and unusual nature of the inquiry, hearsay evidence may be necessary for the staff to rely upon in forming its opinion; and if in the subsequent judicial review the jury is not to abdicate its obligation to make an independent judgment, it must, in its turn, have access to all of the information, including the hearsay evidence, underlying the expert opinion of the psychiatrists. Thus the experts are afforded the latitude essential to perform their function and the jury is not restricted in its purview of the case. Nevertheless, no evidence denying a prisoner the right of confrontation should be admitted unless indispensable to explain to the jury the foundations of the psychiatric opinions; admission of such evidence is hardly justified where the psychiatrists have relied primarily on personal interviews and available witnesses in forming their conclusions.

Of course, beyond the confrontation issue, due process commands that a reliable evidentiary foundation be laid in defective delinquency proceedings, as in any other proceeding, civil or criminal. Accordingly, any assessment of the sufficiency of the evidence to support a defective delinquency finding involves scrutiny of the character as well as the substance of the admitted evidence. If at the judicial hearing there appears serious doubt as to the reliability or trustworthiness of the reports of antisocial or criminal behavior, the trial judge should in the exercise of his discretion exclude the hearsay. Likewise, as to hearsay evidence which is admitted, the jury should be duly cautioned on the risks inherent in any hearsay testimony.

III. RIGHT TO COUNSEL

Although counsel is provided at the judicial hearing itself, he is presently entirely excluded from the interrogations and investigations conducted by the staff for the purpose of determining defective delinquency. One perceives a strong analogy, however, between the initial steps at Patuxent and the pretrial stages of criminal prosecutions in which the Supreme Court has insisted on the right to counsel: Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) (police interrogations); United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) (lineups); and Coleman v. Alabama, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970) (preliminary hearings before magistrates). Both the Patuxent prehearing stages and preliminary criminal phases are critical links in chains potentially leading to long confinement, and the same due process considerations dictate counsel's presence under both schemes. The assistance of counsel during the fact-gathering and adjudicating process at Patuxent might protect the inmate against misguided or erroneous conclusions by the staff[9] and could facilitate timely discovery of the nature of the state's case, making possible the preparation of a proper defense at the judicial hearing.

As discussed in the preceding section, the record compiled by the staff embodies an accumulation of information some of which may be of doubtful reliability. The inmate's background is by the staff's own admission one of the most important factors, if not the single most important factor,

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[9] In Thornton v. Corcoran, 132 U.S.App.D.C. 232, 407 F.2d 695 (1969), the court discussed the implication of United States v. Wade, *supra*, in respect to counsel's participation in staff conferences at Saint Elizabeths Hospital where a recommendation is reached as to a defendant's competency and criminal responsibility. The court held that counsel should be included in the process, though the incomplete factual record in that case prevented the court from formulating precise rules. The court emphasized:

> [T]here can be little doubt that his staff conference at Saint Elizabeths will represent an important confrontation [of the defendant] with experts likely to testify for the Government. Moreover, just as the Supreme Court argued in *Wade* that a witness once having identified a suspect in a lineup is unlikely to retract the identification at trial, our experience suggests that the representatives of Saint Elizabeths rarely contradict in their testimony at trial an opinion they have voiced at the staff conference.

407 F.2d at 699.

in diagnosing the inmate. If the history is inaccurate, the medical evaluation is liable to be incorrect. There must be an early opportunity for counsel to question the contents of the inmate's dossier to avert the danger of a vital staff recommendation being founded on false data.

The majority makes this interesting suggestion:

> "* * * it might prove fruitful to permit the independent psychiatrist to participate in the proceedings at an earlier stage than is presently allowed; his participation in staff conferences may be beneficial to the staff and to the inmate he examines."

I agree, but do not see why a measure of participation by counsel should not be tolerated. As Judge Bell of this court has declared:

> "* * * there is no reason to assume that reputable counsel and psychiatrists could not cooperate in the administration of tests and the necessary factual investigations of the patient's background to verify or refute his own statements."

Timmons v. Peyton, 360 F.2d 327, 331 (4th Cir. 1966).

Indeed, there is reason to think that much of the present resistance of prisoners to submitting to the Patuxent interrogations arises from suspicion and misunderstanding on their part which a lawyer could in many cases dispel, thus facilitating the staff's work. Staffmen, at the beginning at least, are likely to be suspect simply because they are members of the institutional apparatus.

The retained or appointed counsel should consult with the prisoner as soon as practicable after his admission to the Institution. I would not insist that counsel be present during the individual psychiatric examinations, but counsel should be allowed access to the information concerning the prisoner's history as it is assembled. When the inmate is admitted into the final conference for questioning by the staff, counsel should be allowed to attend, to interrogate his client in order to clarify matters in dispute, and to make a statement on his client's behalf. Although the staff may of course consult with one another in private, a free and open discussion by counsel with the psychiatric staff as to the basis of their report should be encouraged. It

would enhance the fairness of the process and enable counsel to obtain a minimal familiarity with the complex psychiatric issues a defective delinquency determination is likely to involve. It is not my purpose to convert the staff conference into a full-fledged adversarial proceeding, but only to guard as far as possible against the informal fact-gathering's resulting in an inaccurate factual basis for the psychiatrists' conclusions.

There is no justification for the unlimited confidence accorded to the staff members and the apprehensions the majority expresses over the allowance of any role to lawyers. I rather think that the staff is inclined to overestimate the need and the usefulness of secrecy, and that if a more flexible policy were adopted it would be found not unworkable, but beneficial. It would help to clear away suspicion that fundamental fairness is being destroyed under a cloak of concealment.

The above suggestions with respect to the right of counsel are advanced tentatively. If adopted, they should be deemed, like other conclusions of mine and the majority's own holdings, subject to review and reconsideration from time to time as experience dictates.

IV. THE STANDARD OF PROOF

The Defective Delinquent Act does not itself specify the burden of proof that the state must sustain in order to commit an individual to Patuxent for an indefinite period. The Maryland courts have sanctioned the civil standard of "fair preponderance." *See* Purks v. State, 226 Md. 43, 171 A.2d 726 (1961).

The petitioners assert on the contrary that due process requires the state to prove "beyond a reasonable doubt" that the inmate is a defective delinquent. They rely on the recent Supreme Court case of In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), which invalidated a New York statutory provision allowing juvenile delinquency determinations to be made upon a preponderance of the evidence. The Court held that proof beyond a reasonable doubt is constitutionally required in adjudications of juvenile delinquency as in criminal trials. It expressly rejected the New York Court of Appeals' view that there was only

a "tenuous" difference between the reasonable doubt and the preponderance standards. The Supreme Court would not acquiesce in this minimization of the difference. Instead it stressed the danger that the lesser standard might be misinterpreted as calling on the trier of fact "merely to perform an abstract weighing of the evidence in order to determine which side has produced the greater quantum, without regard to its effect in convincing his mind of the truth of the proposition asserted." 397 U.S. at 367, 90 S.Ct. at 1074. The reasonable doubt standard is indispensable in both criminal and juvenile proceedings, according to the Supreme Court, for "it impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue." 397 U.S. at 364, 90 S.Ct. at 1072.

The objections to the preponderance standard apply with equal force in defective delinquency hearings—indeed they are even more compelling in the latter class of cases, since indefinite incarceration is at stake. Due process commands that the jury must be satisfied beyond a reasonable doubt as to all objective facts in dispute, including the truth of any alleged incidents relied upon by the psychiatrists in reaching their recommendation.

It must be recognized, however, that as to the *ultimate* issue of the inmate's dangerousness, the beyond a reasonable doubt standard may in practical operation be too onerous. After all, the ultimate issue is not as in a criminal case whether an alleged act was committed or event occurred, but the much more subjective issue of the individual's mental and emotional character. Such a subjective judgment cannot ordinarily attain the same "state of certitude" demanded in criminal cases. A number of commentators have suggested that a standard lying between the civil and the criminal may suffice where a determination of "dangerousness" is at issue. Frequently advocated is a standard of "clear and convincing evidence." [10]

This measure of proof is not entirely lacking in judicial support. In Woodby v. Immigration and Naturalization Service, 385 U.S. 276, 87 S.Ct. 483, 17 L.Ed.2d 362 (1966),

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[10] Note, Civil Commitment of the Mentally Ill: Theories and Procedures, 79 Harv.L.R. 1288, 1291 (1966); Comment, Due Process for All—Constitutional Standards for Involuntary Civil Commitment and Release, 34 U.Chi.L.R. 633, 654-59 (1967).

the Supreme Court was faced with a dilemma similar to the one we now confront. The issue was what standard of proof is required in deportation proceedings. The Court held that deportation could not be considered tantamount to a criminal conviction, and did not call for the same standard of proof. Yet, perceiving that deportation was a drastic deprivation, the Court held it impermissible for an individual to be "banished from this country upon no higher degree of proof than applies in a negligence case." 385 U.S. at 285, 87 S.Ct. at 487. The Court fashioned an intermediate standard of "clear, unequivocal, and convincing evidence." [11]

The Court's approach in *Woodby* seems to be suitable for defective delinquency hearings. We should not tolerate the lax standard presently employed in committing inmates to potentially lifetime incarceration at Patuxent. Due process, I would hold, requires that the state shall establish by at least "clear and convincing evidence" that the individual is a defective delinquent. As Justice Harlan commented in his concurrence in *Winship, supra,* "a standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." 397 U.S. at 370, 90 S.Ct. at 1076. The standard of proof is more than an empty semantic exercise; it reflects the value society places on individual liberty. I cannot agree that the Constitution tolerates an indeterminate confinement at Patuxent on no higher level of proof than that applied in a civil proceeding for money damages.

V. CONCLUSION

In light of the views set forth in Parts III and IV, I would reverse the decision of the District Court and require the state to hold new defective delinquency hearings for the petitioners under a proper standard of proof. In any fact-finding and adjudicative process hereinafter conducted by

[11] The Court noted that standard was no stranger to the law, and has been traditionally imposed in civil cases involving allegations of civil fraud, adultery, illegitimacy of a child born in wedlock, lost wills, oral contracts to make bequests, and the like. 385 U.S. at 285 fn. 18, 87 S.Ct. 483. *See* 9 Wigmore, Evidence § 2498 (3d. 1940).

the Patuxent staff, counsel should be allowed to participate in the manner described in Part III.

As already indicated, I think that the courts should regard Patuxent with a benign eye and that for the present a degree of flexibility is appropriate in dealing with Patuxent issues. I venture now to add a word of admonition to the officials of the Institution. In formulating and executing institutional policies the administrators should defer to traditional standards of fair procedure prized, even though not specifically commanded, by the courts. The officials' aim should not be minimal compliance to escape judicial condemnation, but maximum compliance with the spirit and essence of the Bill of Rights protections. Present policies and practices should be thoroughly examined by them in light of these principles. Administered with this unstinting attitude, the Institution's still experimental program will the more likely progress smoothly and meet with general satisfaction.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE
FOURTH CIRCUIT

No. 13,421

ALBERT DELANOR MUREL, *Appellant,*

vs.

BALTIMORE CITY CRIMINAL COURT, and Director of Patuxent Institution, State of Maryland, *Appellees.*

Appeal from *the United States District Court for the District of* Maryland.

This cause *came on to be heard on the record from the United States District Court for the District of* Maryland, *and was argued by counsel.*

On consideration whereof, *It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby,* affirmed.

/s/ Samuel W. Phillips
Clerk

Filed, JAN 4, 1971, Samuel W. Phillips *Clerk*

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Filed, MAR 1, 1971, Samuel W. Phillips, *Clerk*

No. 13,415

CHARLES MASON TIPPETT, *Appellant*,

v.

STATE OF MARYLAND, and Director of Patuxent Institution, *Appellees*.

No. 13,421

ALBERT DELANOR MUREL, *Appellant*,

v.

BALTIMORE CITY CRIMINAL COURT, and Director of Patuxent Institution, State of Maryland, *Appellees*.

No. 13,426

ROBERT HAYES, JR., *Appellant*,

v.

HAROLD M. BOSLOW, M.D., Director, Patuxent Institution, *Appellee*.

No. 13,433

WILLIAM R. MONROE, *Appellant*,

v.

DIRECTOR OF THE PATUXENT INSTITUTION, and State of Maryland, *Appellees*.

No. 13,434

BRADLEY ARLINGTON AVEY, *Appellant*,

v.

STATE OF MARYLAND, Harold M. Boslow, as Director of Patuxent Institution, and Vernon L. Peppersack, as Commissioner, State Department of Corrections, *Appellees*.

No. 13,441

GEORGE L. CRESWELL, *Appellant*,

v.

DIRECTOR, PATUXENT INSTITUTION, *Appellee*.

APPEALS FROM THE UNITED STATES DISTRICT COUNT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE.

Upon consideration of the appellants' petition for rehearing and suggestion for rehearing *en banc*, the panel having determined that the petition presents no questions warranting reconsideration, and no judge in regular active service having requested a poll of the Court,

IT IS ORDERED that the petition for rehearing *en banc*, be, and the same is hereby, denied.

For the Court:
/s/ Clement F. Haynesworth, Jr.
Chief Judge, Fourth Circuit

UNITED STATES COURT OF APPEALS
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No. 13,415

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No. 13,441

GEORGE L. CRESWELL, *Appellant*,

v.

DIRECTOR, PATUXENT INSTITUTION, *Appellee*.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE.

Upon consideration of the appellants' petition to recall the mandate and their second petition for a rehearing with

a suggestion for rehearing en banc, the panel having determined that the petition presents no question warranting reconsideration, Judge Sobeloff in a separate statement explaining the reason for his conclusion, and no Judge in regular active service having requested a poll of the Court,

IT IS ORDERED that the petition to recall the mandate and for a rehearing by the panel or en banc be, and the same is hereby, denied.

For the Court:
/s/ Clement F. Haynesworth, Jr.
Chief Judge, Fourth Circuit

SOBELOFF, Senior Circuit Judge, concurring specially:

Joining in the denial of the petition for rehearing, I wish to add a word of explanation.

If I am correct in my interpretation, the petitioners assert that, despite the court's finding that Patuxent has adequate facilities, the petitioners or some of them are in fact not receiving treatment. In my separate opinion heretofore filed in this case I observed:

> Any future review must appraise not only the general treatment program, but whether the particular prisoner before the court is receiving the benefits of Patuxent's program. It does him no good if there is a program of treatment, but it has been arbitrarily withheld from him.

Such issues, however, cannot be adjudicated abstractly but only upon a fully developed record from which the court may ascertain what if any treatment is afforded the particular inmate; his condition and whether he is in fact treatable; and any other relevant information.

The present record is not sufficient for this purpose.

SUPREME COURT OF THE UNITED STATES

No. 70-5276, October Term, 194.

ALBERT DELANOR MUREL et al., *Petitioners*,

v.

BALTIMORE CITY CRIMINAL COURT et al.

On petition for writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

December 20, 1971

☆ U.S. Government Printing Office: 1972—456-451/473